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Supreme Court of the United States

OCTOBER TERM, 1932.

No. 531.

GENEVIEVE A. CLARK,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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INDEX.

Page.

Petition for writ of certiorari 1
I. Summary statement of the matters involved 2
II. Reasons relied on for the allowance of the writ 4
Brief in support of petition 7
Statement 7
Specification of assigned errors intended to be urged 13
Summary of argument 13
Argument 14
First Point—It was a denial of due process of law for the District Court to proceed to trial on the return day named in the rule to show cause 14
Second Point—It was a denial of due process of law to convict petitioner of contempt for withholding information when she was charged in the information with an entirely distinct and different contempt 16
Third Point—A juror's failure to volunteer information on his voir dire is not a contempt 19
Fourth Point—Perjury by a juror on his voir dire is not a contempt unless contumacy is shown 21
Fifth Point—Petitioner's conviction for contempt for committing perjury on her voir dire was not proved beyond a reasonable doubt or even sustained by any relevant evidence 26
Sixth Point—A conviction of contempt for committing perjury cannot be sustained where based wholly upon circumstantial evidence 28
Seventh Point—The statements and vote of a petit juror during the deliberations of the jury are privileged 31
Eighth Point—The erroneous reception of evidence which is relied upon by a trial court in arriving at its judgment is reversible error 36
Conclusion 37

TABLE OF CASES CITED.

Page.

Allen vs. United States, 194 Fed. 664 (C. C. A. 4)..... 31
Anargyros vs. Anargyros & Co., 191 Fed. 208..... 18
Bates Case, 55 N. H. 325..... 18
Boyd vs. Glucklich, 116 Fed. 131 (C. C. A. 8).....15, 26
Bushell's Case, Vaughan 135..... 37
Canal Zone vs. Kerr, 2 Canal Zone Sup. Ct. 262..... 31
In re Clark, 208 Mo. 121, 106 S. W. 990.....15, 18
Clayton vs. United States, 284 Fed. 537..... 30
Cooke vs. United States, 267 U. S. 517, 537.....15, 17
Gompers vs. Buck's Stove & Range Co., 221 U. S. 418, 440.....16, 28
Hammer vs. United States, 271 U. S. 620..... 29
Hegelaw vs. State, 24 Ohio App. 103, 155 N. E. 620..... 26
Hewitt vs. Chapman, 49 Mich. 4..... 33
Ex parte Hudgings, 249 U. S. 378.....23, 25
Matter of Cochran, 237 N. Y. 336, 143 N. E. 212.....27, 34
McDonald vs. Pless, 238 U. S. 264, 269..... 34
Michaelson vs. United States, 266 U. S. 42..... 28
Ex parte Nelson, 251 Mo. 63, 157 S. W. 794.....15, 18
In re Nunns, 188 App. Div. 424, 176 N. Y. Supp. 858..... 34
People vs. Hille, 192 Ill. App. 139..... 26
People vs. Stone, 181 Ill. App. 475..... 26
Riley vs. Wallace, 188 Ky. 471, 222 S. W. 1085..... 26
Ex parte Robinson, 19 Wall. 505..... 22
Sinclair vs. United States, 279 U. S. 749, 765..... 38
State vs. Muse, 200 Wis. 460, 229 N. W. 31..... 25
Sullivan vs. United States, 161 Fed. 253 (C. C. A. 1)..... 31
United States vs. Appel, 211 Fed. 495..... 24
United States vs. Wood, 14 Peters 430..... 29
Woodward vs. Leavitt, 107 Mass. 453..... 33

STATUTES CITED.

28 U. S. C. A. 385..... 21

TEXT BOOKS CITED.

11 A. L. R. 342, 352..... 26
15 A. L. R. 634, 637..... 31
Prof. Beale, "Contempt of Court," 21 Harv. L. Rev. 161..... 22
Hughes on Evidence, p. 301..... 32
Jones, Commentaries on Evidence, 2nd Ed., Sec. 2212..... 32
Wigmore on Evidence, Secs. 2040-2043..... 29
Wigmore on Evidence, Sec. 2285..... 31
Wigmore on Evidence, Sec. 2346..... 32
Wigmore on Evidence, Secs. 2348-2354..... 33

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Genevieve A. Clark, respectfully submits her petition for a writ of certiorari to review the judgment of the United States Circuit Court of Appeals for the Eighth Circuit in the above entitled cause.

The Circuit Court of Appeals has affirmed a judgment rendered in the United States District Court for the District of Minnesota adjudging petitioner guilty of contempt of court and sentencing petitioner to six months in jail and to pay a fine of $1,000.00, but the Circuit Court of Appeals has ordered said cause remanded to the District Court for the District of Minnesota for resentencing, with directions to impose fine or imprisonment in the alternative.

I.

SUMMARY STATEMENT OF THE MATTERS INVOLVED.

Petitioner served as a juror in the case of *United States vs. W. B. Foshay, et al.*, a celebrated mail fraud case tried in the United States District Court of Minnesota. The trial lasted about seven weeks and the jury was out about one week. The jurors were unable to agree and were finally discharged on October 23, 1931.

Shortly thereafter an information charging petitioner with criminal contempt was filed. A rule was issued directing petitioner to show cause "why she should not be adjudged in contempt of the authority of this Court as prayed in said petition" or information (R. 1-6). On the return day petitioner filed her sworn answer positively denying all of the charges (R. 6-10). Counsel for petitioner asked for additional time to prepare for trial, but this was denied and the Court proceeded to hear witnesses on behalf of the government (R. 10-12). At the close of the government's case, however, the Court did grant a continuance for ten days to enable counsel for petitioner to prepare her defense (R. 58, 59).

The information charged petitioner with contempt of court for committing perjury on her *voir dire*. Omitting the charges of perjury of which she was found not guilty, the charges were (1) that she falsely stated the nature of her own previous employment, and (2) that she falsely stated that she believed herself to be unbiased (R. 1-6). No claim is made that petitioner did not answer the questions put to her respectfully. Both the District Court and the Circuit Court of Appeals appear to concede that perjury was not proved in connection with petitioner's an-

swers as to her previous employment, but both courts have found her guilty of contempt for failing to disclose that over two years prior to her examination she was employed for ten days as a stenographer by W. B. Foshay Company, a corporation of which the defendants in the criminal case were officers. Both courts have found petitioner guilty of contempt of court for stating that she believed herself to be unbiased. The record seems barren of evidence tending to prove conscious bias on the part of petitioner at the time of the *voir dire*. Over objection, testimony was received as to what she subsequently said and did during the course of the trial and during the deliberations of the jury, and the fact that she voted for an acquittal, all of which evidence was relied upon by the trial court in finding that petitioner was biased, and knew she was biased, one to eight weeks earlier, when she was examined on this subject.

There was absolutely no evidence of corruption on the part of petitioner and absolutely no evidence affording any motive to petitioner to answer falsely or deceive the Court. This is conceded in the majority opinion in the Circuit Court of Appeals (R. 136). Likewise the evidence established that petitioner did not know any of the defendants in the criminal case (R. 104, 105).

Petitioner was sentenced to serve six months in jail and to pay a fine of $1,000.00.

The Circuit Court of Appeals affirmed the judgment of the District Court but set the sentence aside and remanded the case for the purpose of resentencing (R. 125-145, 164, 165). The sentence was set aside because under the statute contempt of court may be punished by fine or imprisonment but not by both. 28 U. S. C. 385.

Gardner, Circuit Court Judge, dissented in an able opinion (R. 145-164).

A more detailed statement of the matters involved is set forth in the annexed brief:

II.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

A. The Circuit Court of Appeals erred in holding in effect:

1. That it was "due process of law" for the District Court to require petitioner to proceed to trial on the return day named in the order to show cause, when she was allowed only three business days to select counsel, prepare her answer, and prepare for trial.

2. That it was "due process of law," when the only charge against petitioner was that she was guilty of contempt of court for committing "wilful and corrupt perjury" on her *voir dire*, to find her guilty of a never-before-heard-of contempt, to-wit: failure to volunteer information.

3. That a failure to volunteer information by a prospective juror on his *voir dire* is a contempt.

4. That if a juror commits perjury on his *voir dire*, that *ipso facto* constitutes a contempt even though no contumacy is shown.

5. That a juror's sworn statement that he believes himself to be unbiased is proved to be "false and corrupt perjury," beyond a reasonable doubt, by (1) proof of subsequent statements made by the juror in the course of the trial and during the deliberations of the jury tending to show bias at the time such statements

were made (but not indicating consciousness of bias), and (2) by proof of the juror's vote to acquit.

6. That the principle which applies on an indictment for perjury that a conviction may be had only on direct testimony of two witnesses (or of one witness supported by corroborating circumstances) as to the falsity of the testimony given, does not apply in a criminal contempt proceeding charging "false and corrupt perjury."

7. That statements of a juror during the deliberations of the jury and the juror's vote to acquit may be shown in a criminal contempt proceeding based upon what transpired on the *voir dire* and that such matters are not privileged.

8. That even if incompetent evidence is erroneously received by the trial court and it appears by the decision of the trial court that such evidence was relied upon by it in arriving at its decision, that is not necessarily reversible error.

B. In the majority opinion of the Circuit Court of Appeals it is stated "that many important questions are raised by the assignments of error" (R. 125). In the dissenting opinion in the Circuit Court of Appeals it is stated "the proceedings sanctioned by the majority opinion in the instant case will go far to undermine the independence and freedom of the jury" (R. 162).

C. Your petitioner is advised and believes that the Circuit Court of Appeals in affirming the judgment of the District Court has deprived petitioner of important rights vouched to her by the Constitution of the United States; has decided important questions of general law in conflict

with the decisions of this Court and with the weight of authority, and has so far sanctioned a departure by the District Court from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision, all of which will more fully appear in the annexed brief.

SIGURD UELAND,
Counsel for Petitioner.

UNITED STATES OF AMERICA,
DISTRICT OF MINNESOTA, ss.
COUNTY OF HENNEPIN.

SIGURD UELAND, being duly sworn, says he is counsel for the petitioner named in the foregoing petition; that he knows the contents of such petition, and that the facts therein stated are true to the best of his knowledge and belief.

SIGURD UELAND.

Subscribed and sworn to before me this 17th day of November, 1932.

MAUD GOLDSBURY,
(Notarial Seal) Notary Public,
Hennepin County, Minn.

My commission expires Dec. 16, 1936.

Supreme Court of the United States

OCTOBER TERM, 1932.

GENEVIEVE A. CLARK,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITIONER'S BRIEF.

STATEMENT.

Petitioner has been convicted of contempt of court by the United States District Court of Minnesota upon a charge that she committed perjury in her examination as a prospective juror in a criminal case. Petitioner was charged with perjury in the following respects (there were other charges of perjury of which she was found not guilty):

(1) That she falsely stated the nature of her own previous employment; and

(2) That she falsely stated that she believed herself to be unbiased (R. 1-6).

Petitioner, a married woman with two children, received a summons to report as a juror on August 24, 1931. The summons directed her to report on September 1st, following (R. 2). The case for which appellant was summoned was the case of *United States vs. W. B. Foshay, et al.*, a

celebrated mail fraud case (R. 1, 2).

Petitioner married in January, 1921 (R. 65). Prior to that she had been employed for about three years as a stenographer in the bank of which her husband was president (R. 65, 75). In this connection she worked in the real estate and insurance departments of the bank. She was given the title of assistant cashier (R. 50, 58). This was to enable her to sign cashier's checks and drafts in the absence of other officers (R. 65). After her marriage she continued to work in the bank until August, 1921, when she became pregnant.

Subsequent to her marriage petitioner was temporarily employed on several occasions. While she and her husband were in Florida in 1925-1927, she worked for a short time with a Nash automobile agency (R. 78). Later she did some temporary work for a public stenographer, a Miss Singler (R. 78).

One of the corporations in which the defendants in the criminal case were interested was the W. B. Foshay Company. Petitioner had been temporarily employed by that company, doing some sort of copying work, for ten days in the summer of 1929 (R. 8, 48, 49, 65). During this temporary employment petitioner did not meet any of the defendants and it appears on the record without contradiction that she did not know any of the defendants (R. 9, 44-48, 67). In the years 1922 and 1923, petitioner's husband had had some business transactions and correspondence with one of the defendants, W. B. Foshay, as president of the W. B. Foshay Company, and he had a casual business acquaintance with one of the other defendants (R. 51-58). But petitioner's testimony that she did not know that her husband was acquainted with any of the defendants stands uncontradicted (R. 67).

On September 1, 1931, petitioner appeared in court pursuant to the summons. Prior to her examination she conversed with several other women who were also summoned. The District Court found that at this time she "made the statement to several other women on the panel that she wished to serve on the jury; that she had a special reason for wanting to be on the jury, and that she was afraid that her former employment by the Foshay Company would disqualify her" (R. 100). As a matter of fact, the only witness to testify that petitioner said she had a "special reason" for wanting to serve as a juror was Mrs. Passer (R. 13). Mrs. Johnson testified that petitioner said "she knew very little about the Foshay case" and had not followed it (R. 21). Mrs. Passer testified that Mrs. Clark said "that she had worked in the Foshay Building, but that she was sure that would not disqualify her for jury service." Mrs. Johnson testified that petitioner "only wondered if" her former employment at the Foshay Company "would disqualify her as a juror" (R. 19). Mrs. Anderson testified that petitioner "thought probably she would not be accepted on account of working there" (R. 91). Mrs. Passer, Mrs. Johnson and Mrs. Anderson were all government witnesses.

It should be noted that Mrs. Passer was a seriously discredited witness. According to her testimony she and Mrs. Clark talked about the criminal case at some length (R. 13), and yet when Mrs. Passer was subsequently examined as a prospective juror she was asked: "Have you ever talked to anybody about the case?" and she answered: "I have never mentioned it to a soul" (R. 90).

Prior to her examination petitioner made an oath "that she would true answers make to the questions which should be put to her touching upon her qualifications and competency to sit as a juror on the said trial" (R. 2). In the

course of her examination she was asked the following questions and made the following answers:

"Q. Have you yourself ever been in any business of any kind?

A. I have been a stenographer before my marriage, yes.

Q. In what kind of business did you work?

A. Well, I did some banking, and some real estate and insurance, and I was with an automobile concern, with a Nash agency. * * *

Q. And do you feel that you are now—that your mind is now open and free, and that you are not biased either one way or the other?

A. Yes, I do feel that way.

Q. And do you think in the trial of this lawsuit, you could follow the evidence, or would try to follow the evidence, and base your judgment on that and the law as given to you by the Court?

A. Yes, I do."

It is on account of the above answers, and those alone, that petitioner has been convicted.

Petitioner was not asked on her *voir dire* by either the Court or counsel *by whom* or *when* she had been employed (R. 16-18).

Petitioner was accepted and sworn as a juror. At her subsequent trial the Court received over objection the testimony of two jurors that during the first week of the trial in the Foshay case petitioner said to them that she had read in the papers that Mr. Foshay had gone East to arrange an $18,000,000 loan and the crash came and he came back without a dollar, and that she believed he was a victim of circumstances (R. 22, 26). The Court also received over

objection testimony of two other jurors to the effect that some time during the course of the trial petitioner said "that she did not have no use for the government, on account that they did not use the soldiers right when they came back from the war" (R. 31, 26). The Court also received over objection testimony as to what petitioner said and did during the deliberations of the jury after the jury had retired; that she said she considered counsel for the government "a very brilliant attorney, and as long as he could not convince her there was no chance of you eleven men to convince me"; that "sometimes she held her hands up over her ears, and it was hard to argue with anyone that won't reply. She said she could not send these seven men to the penitentiary because it would bother her the rest of her life, if she lived to be a hundred years old," etc. (R. 24, 25, 26, 27, 28, 30, 31).

The Court also received over objection testimony to show that petitioner's husband visited her about once a week during the course of the trial, but not after the jury retired to consider their verdict, and testimony intended to establish by inference that petitioner's husband during these visits had discussed one of the government's witnesses with petitioner in such a way as to prejudice petitioner against this witness (R. 34-44, 93-95). Other jurors were visited by members of their families during the same period (R. 29). The woman bailiff in charge of petitioner testified that she heard all the conversations between petitioner and her husband and that it all appertained to domestic affairs (R. 44).

The trial of the Foshay case lasted about seven weeks and the jury were out about one week, being finally discharged on October 23, 1931. The Court received over objection evidence to show that the jury stood eleven for con-

viction and one (petitioner) for acquittal (R. 24).

An information for criminal contempt was filed on November 4, 1931, and a rule to show cause was issued thereon returnable November 9, 1931 (R. 1-6). On the return day petitioner filed a sworn answer positively denying all of the charges (R. 6-10). Counsel for petitioner asked for additional time to prepare for trial, but this was denied and the Court proceeded to hear witnesses on behalf of the government (R. 10-12). At the close of the government's case, however, the Court did grant a continuance for ten days to enable counsel for petitioner to prepare her defense (R. 58, 59).

Petitioner took the stand on her own behalf and denied emphatically that she ever had any special interest in the case, or that she had ever so stated to Mrs. Passer (R. 66). She testified that except for two appearances in traffic court this was her first court experience, and that she was extremely nervous, and that at the time of her examination by Judge Molyneaux, the matter of her previous employment by the Foshay Company did not come to her mind (R. 65, 67). She denied any intention to mislead the Court (R. 68). She asserted the truth of her answers as to bias (R. 67). On cross examination she flatly denied that she had ever criticized the treatment of the soldiers by the government (R. 90).

Perhaps the most significant fact about the testimony in the case is that there was absolutely no evidence of corruption on the part of petitioner and absolutely no evidence affording any motive to petitioner to answer falsely or deceive the Court. This is conceded in the majority opinion in the Circuit Court of Appeals (R. 136).

Petitioner was found guilty and sentenced to six months in jail and to pay a fine of $1,000.00. The District Court

found that while petitioner's answers as to her former employment were not perjury, they were evasive and misleading, and that by reason of her failure to disclose her ten days' employment with the Foshay Company over two years prior to the examination she was guilty of contempt. The District Court likewise found that petitioner's answers as to her bias were "false and untrue" and constituted contempt (R. 99-108).

The Circuit Court of Appeals affirmed the judgment of the District Court but set the sentence aside and remanded the case to the trial court only for the purpose of resentencing (R. 121, 145, 164, 165). The sentence was set aside because under the statute contempt of court may be punished by fine *or* imprisonment but not by both. 28 U. S. C. 385.

Gardner, Circuit Court Judge, dissented in an able opinion (R. 145-164).

SPECIFICATION OF ASSIGNED ERRORS INTENDED TO BE URGED.

In the event that this Court should grant a writ of certiorari, petitioner intends to urge assigned errors numbered 1 to 24, inclusive (R. 109-113).

SUMMARY OF ARGUMENT.

1. It was a denial of due process of law for the District Court to proceed to trial on the return day named in the rule to show cause.

2. It was a denial of due process of law to convict petitioner of contempt for withholding information when she was charged in the information with an entirely distinct and different contempt.

3. A juror's failure to volunteer information on his *voir dire* is not a contempt.

4. Perjury by a juror on his *voir dire* is not a contempt unless contumacy is shown.

5. Petitioner's conviction for contempt for committing perjury on her *voir dire* was not proved beyond a reasonable doubt, or even sustained by any relevant evidence.

6. A conviction of contempt for committing perjury cannot be sustained where based wholly upon circumstantial evidence.

7. The statements and vote of a petit juror during the deliberations of the jury are privileged.

8. The erroneous reception of evidence which is relied upon by a trial court in arriving at its judgment is reversible error.

ARGUMENT.

First Point.

It was a denial of due process of law for the District Court to proceed to trial on the return day named in the rule to show cause.

1. The rule to show cause directed petitioner to show cause on November 9, 1931, which she did by filing a sworn answer (R. 6-9). The rule did not apprise petitioner that a trial would be had on November 9th and a large number of witnesses examined on behalf of the government. Petitioner was only allowed three days in which to procure counsel, prepare her answer, and prepare for trial (R. 10-12). In the meantime it appears that the special assistant to the attorney general of the United States and at least three government investigators had been working on the case (R.

18, 19). There was no good reason why petitioner should be rushed to trial before she was ready.

2. Due process of law in contempt cases, except in cases where a judge knows that a contempt has been committed and inflicts a summary punishment, requires that the accused should have a "reasonable opportunity" to make his defense.

Cooke vs. United States, 267 U. S. 517, 537.
In re Clark, 208 Mo. 121.
Ex Parte Nelson, 251 Mo. 63, 157 S. W. 794.

In *Boyd vs. Glucklich*, 116 Fed. 131, C. C. A. 8, it is said (p. 134):

> "Despatch in judicial proceedings is commendable, but, in proceedings involving the liberty of a citizen, he has a right not only to be informed of the precise claim against him, but, after receiving that information, he has a right to a reasonable time to prepare his answer and present his proofs, and, lastly, to be heard by counsel on the law and facts of the case."

3. It is no answer that when the government had rested, petitioner was allowed ten days in which to prepare her defense. Petitioner was entitled to a reasonable time for preparation before the trial began. She was entitled to a reasonable time in which to investigate the government's witnesses, prepare on the law, etc. When the continuance for ten days was granted, the damage had already been done and the precipitate haste of the trial court in commencing the trial may account for the fact that petitioner, instead of having a trial on definite issues in accordance with usual rules of evidence and of trial procedure, was subjected to a general inquisition.

SECOND POINT.

It was a denial of due process of law to convict petitioner of contempt for withholding information when she was charged in the information with an entirely distinct and different contempt.

1. The District Court and the Circuit Court of Appeals have found petitioner guilty of two items of alleged misconduct: (1) Failure to disclose her ten days' employment by the Foshay Company, which employment was two years prior to her examination; and (2) perjury for stating that she felt unbiased and thought she could base her verdict on the evidence and the law as given to her by the Court. Unless petitioner could be lawfully found guilty of contempt on both of these counts the Circuit Court of Appeals was bound to reverse the judgment of the District Court.

Gompers vs. Buck's Stove & Range Co., 221 U. S. 418, 440.

2. The startling fact is that petitioner has been convicted of something claimed to constitute a contempt of which she was not accused. The information alleged that on her *voir dire* she "wilfully and corruptly and contrary to her said oath did swear and depose * * * that she, the said Genevieve A. Clark, had been in business, *but that was before she was married*, and that she had been a stenographer working as such in the banking, insurance and real estate business and with a Nash automobile agency; * * * and the said Genevieve A. Clark, in the manner and form aforesaid, *having taken an oath* before a competent tribunal in a case wherein the law of the United States authorized an oath to be administered that she would truly depose and testify, wilfully and *contrary to her said oath, did depose*

and state material matters which she did not then believe to be true and did then and there commit *wilful and corrupt perjury;* and the due administration of justice * * * was in fact *thereby* corruptly and unlawfully impeded and obstructed" (R. 3-5). (Italics ours.)

3. The statement in the decision of the trial court that "the information specifically informed Mrs. Clark that she was guilty of contempt on account of her failure to disclose the fact of her employment with the Foshay Company" is not true (R. 4, 106).

4. In a case of criminal contempt in open court where the trial judge *knows* through his senses that a contempt has been committed, there may be a summary conviction. The present is obviously not such a case. In all other cases the alleged contemnor is entitled to all the safeguards imposed by "due process of law." This means all the protection vouched in cases of indictment except the right of trial by jury. Most important of all to a person whose liberty is thus jeopardized is the right to notice of the offense charged.

> *Cooke vs. United States*, 267 U. S. 517, 537. "Due process of law, therefore, in the prosecution of contempt, except that committed in open court, requires that the accused should be advised of the charges and have a reasonable opportunity to meet them by way of defense or explanation. We think this includes the assistance of counsel, if requested, and the right to call witnesses to give testimony, relevant either to the issue of complete exculpation or an extenuation of the offense and in mitigation of the penalty to be imposed."
>
> (It appears from the decision that the foregoing would apply to all cases except where summary punishment

is inflicted by the trial judge in open court for a contempt *known* by him to have occurred.)

In *Anargyros vs. Anargyros & Co.,* 191 Fed. 208, the Court said: "While the nicety and precision of an indictment may not be required, the pleadings or affidavit must not only specify clearly the acts which the contemnor will be called to meet, but it must quite as clearly, in some form, advise him that the judgment sought against him is one of a punitory character."

In *Bates' Case,* 55 N. H. 325, Chief Justice Foster said: "It seems to me to be more appropriate, and it would seem safe enough for the protection of the Court, to adhere as closely as possible to the plan and method of criminal procedure, except in the matter of jury trial. The attachment should be substantially like an indictment, at least, to the extent of giving the respondent sufficient information concerning the nature and particulars of the offense charged; and the rules of evidence, and the presumptions of law applied in criminal cases, should be observed."

In re Clark, 208 Mo. 121, 106 S. W. 990.

Ex parte Nelson, 251 Mo. 63, 157 S. W. 794.

As said by the Court below in *Boyd vs. Glucklich,* 116 Fed. 131, 134: "in proceedings involving the liberty of a citizen, he has a right * * * to be informed of the precise claim against him."

5. In the case at bar there was no issue raised as to whether petitioner "deliberately and intentionally concealed her employment with the Foshay Company when she was examined by the Court" (R. 105). Petitioner's counsel presented her case on the theory that if her answers did not constitute perjury as charged, she could not be found guilty.

In her answers respecting her employment there was nothing false; there was therefore no occasion to go farther than to prove that fact and to urge it in argument. It is a shocking departure from an ancient, fundamental and just principle of the common law, that petitioner should be sentenced to jail for an alleged offense as to which no issue was tendered.

6. The majority in the Circuit Court of Appeals reason that although the information charged petitioner with contempt for committing perjury the allegations as to perjury were immaterial, and therefore she might be convicted of some other kind of a contempt (R. 125, *et seq.*). We think an information for contempt must specify the kind of contempt complained of, and that kind of contempt must be proved. This seems so elementary as not to call for further argument.

Third Point.

A juror's failure to volunteer information on his voir dire is not a contempt.

1. Even if petitioner had been charged with concealing her ten days' employment, and even if it were shown that her failure to volunteer such information was deliberate, that would not be a contempt.

2. The measure of petitioner's obligation was her oath "that she would true answers make to the questions which should be put to her touching upon her qualifications and competency to sit as a juror on the said trial" (R. 2). She was entitled to assume that this oath was the measure of her duty. If a prospective juror sworn to make "true answers," complies with his oath, how can it be said he has de-

ceived the Court? (R. 105.) If such a one is adjudged in contempt of Court, it is the juror rather than the Court who is deceived.

3. There is no authority to be found (other than the decisions in this cause) to support the proposition that concealment by a prospective juror is a contempt.

4. This newly discovered doctrine is a dangerous one. An inexperienced person undergoing the ordeal of a first examination in a case attracting great public interest is all too likely to make a false answer by reason only of inadvertence, or defect of memory. If one may be "laid by the heels" for what he did *not* say, the intent to conceal being discovered wholly by circumstantial evidence, no juror, especially no dissenting juror, is safe.

5. Logically, the doctrine would also be applicable to witnesses. And yet a witness' answer will be stricken, and the witness is subject to reprimand, if the answer is not responsive. It is the function of the examiner to question the witness until each material fact is either affirmed or denied. This is so notwithstanding the fact that the witness is customarily sworn to tell the "whole truth." If the whole matter is not developed, we never heard it asserted that the blame is upon the witness. Yet no reason appears why a greater amount of loquacity should be expected of the prospective juror.

Fourth Point.

Perjury by a juror on his voir dire is not a contempt unless contumacy is shown.

1. Whatever petitioner said or left unsaid was something done in the presence of the trial judge; it was *in facie curiae*. If a contempt, it was a contempt in open court. No one has suggested that there was any disrespect shown, or that any interruption or delay in the proceedings resulted. That petitioner was not considered contemptuous at that time is shown by the fact that she was accepted as a juror.

2. What constitutes a contempt in open court is indicated by the term itself. The conduct must be contemptuous. It must show disrespect.

3. A crime committed in the court room may or may not be a contempt. If one of the onlookers quietly forges another man's name to a check, that is not punishable as a contempt. To constitute the act a contempt it must interfere with the order and decorum in the court room. Otherwise the wrongdoer must be indicted and tried by a jury.

4. The Federal statute on this subject, 28 U. S. C. A. 385, is as follows:

> "The said courts shall have power to impose and administer all necessary oaths, and to punish, by fine or imprisonment, at the discretion of the Court, contempts of their authority. Such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts in their official transactions, and the disobedience or resistance

by any such officer, or by any party, juror, witness, or other person to any lawful writ, process, order, rule, decree, or command of the said courts."

5. In *Ex parte Robinson*, 19 Wall. 505, this Court had before it the Act of March 2, 1831, which is almost identical in terminology with Title 28, Sec. 385. The Court made it very clear in its opinion that "misbehavior of any person" in the presence of the Court refers only to misbehavior which is openly contemptuous. The Court said at page 511:

> "It limits the power of these courts (Circuit and District) in this respect to three classes of cases: 1st, where there has been misbehavior of a person in the presence of the courts, or so near thereto as to obstruct the administration of justice; 2nd, where there has been misbehavior of any officer of the courts in his official transactions; and 3rd, where there has been disobedience or resistance by any officer, party, juror, witness, or other person, to any lawful writ, process, order, rule, decree, or command of the courts. As thus seen the power of these courts in the punishments of contempts can only be exercised *to ensure order and decorum in their* presence, to secure faithfulness on the part of their officers in their official transactions, and to enforce obedience to their lawful orders, judgments, and processes." (Italics ours.)

See also Prof. Beale, "*Contempt of Court*," 21 Harv. L. Rev. 161.

6. That a crime committed in the court room in the presence of the judge is not *per se* a contempt is forcefully shown by cases dealing with perjury. These cases are controlling here because as has been shown the only contempt charged

against petitioner is for committing perjury on her *voir dire.*

In *Ex parte Hudgings*, 249 U. S. 378, it was held that a District Court has no power to adjudge a witness guilty of contempt solely because in the Court's opinion he is committing perjury. If the same principles as are applicable to a witness apply to a juror on his *voir dire*, that case is controlling in the present litigation. The Court said:

> "That the contumacious refusal of a witness to testify may so directly obstruct a court in the performance of its duty as to justify punishment for contempt is so well settled as to need only statement. Despite some confusion caused by certain ambiguous forms of expression used by the Court below in dealing with the subject, it is indisputable that the punishment for contempt was imposed solely because of the opinion of the Court that the witness was wilfully refusing to testify truthfully, that is, was committing perjury.
>
> "Whether, then, power to punish for contempt exists in every case where a court is of the opinion that a witness is committing perjury, is the test we must here apply. Because perjury is a crime defined by law and one committing it may be tried and punished does not necessarily establish that when committed in the presence of a court it may not, when exceptional conditions so justify, be the subject-matter of a punishment for contempt. * * * This being true, we must ascertain what is the essential ingredient in addition to the elements constituting perjury under the general law which must be found in perjury when committed in the presence of a court to bring about the exceptional conditions justifying punishment under both. * * *

"An obstruction to the performance of judicial duty resulting from an act done in the presence of the Court is, then, the characteristic upon which the power to punish for contempt must rest. This being true, it follows that the presence of that element must clearly be shown in every case where the power to punish for contempt is exerted—a principle which, applied to the subject in hand, exacts that in order to punish perjury in the presence of the Court as a contempt there must be added to the essential elements of perjury under the general law the further element of obstruction to the Court in the performance of its duty. As illustrative of this, see *United States vs. Appel*, 211 Fed. Rep. 495. It is true that there are decided cases which treat perjury, without any other element, as adequate to sustain a punishment for contempt. But the mistake is, we think, evident, since it either overlooks or misconceives the essential characteristic of the obstructive tendency underlying the contempt power, or mistakenly attributes a necessarily inherent obstructive effect to false swearing. If the conception were true, it would follow that when a court entertained the opinion that a witness was testifying untruthfully the power would result to impose a punishment for contempt with the object or purpose of exacting from the witness a character of testimony which the Court would deem to be truthful; and thus it would come to pass that a potentiality of oppression and wrong would result and the freedom of the citizen when called as a witness in a court would be gravely imperiled."

United States vs. Appel, 211 Fed. 495, cited in *Ex parte Hudgings* gives an able presentation of under what circum-

stances perjury may be punished as a contempt. The rule was stated by Judge Hand as follows:

> "The rule, I think, ought to be this: If the witness' conduct shows beyond any doubt whatever that he is refusing to tell what he knows, he is in contempt of court. That conduct is, of course, beyond question when he flatly refuses to answer, but it may appear in other ways. A court, like anyone else who is in earnest, ought not to be put off by transparent sham, and the mere fact that the witness gives some answer cannot be an absolute test. For instance, it could not be enough for a witness to say that he did not remember where he had slept the night before, if he was sane and sober, or that he could not tell whether he had been married more than a week. If a court is to have any power at all to compel an answer, it must surely have power to compel an answer which is not given to fob off inquiry. Nevertheless, this power must not be used to punish perjury, and the only proper test is whether on its mere face, and without inquiry collaterally, the testimony is not a *bona fide* effort to answer the questions at all."

Ex parte Hudgings has been followed in *State vs. Muse*, 200 Wis. 460, 229 N. W. 31, where a conviction for contempt for committing perjury was reversed. It was held there was no obstruction to the Court in the performance of its judicial duty even though exposing the perjury consumed a good part of two days. The Court said:

> "The defendant in this case did not refuse to answer any question propounded to him. So far as appears he answered the questions respectfully."

It has been held repeatedly that in order for perjury to constitute contempt of court the testimony must be of such

a character that the judge before whom it is given can *know* judicially that it is false.

Hegelaw vs. State, 24 Ohio App. 103, 155 N. E. 620.
People vs. Stone, 181 Ill. App. 475.
People vs. Hille, 192 Ill. App. 139.
Riley vs. Wallace, 188 Ky. 471, 222 S. W. 1085.
11 *A. L. R.* 342, 352.

7. In the case at bar the conduct of petitioner was not disorderly, contumacious or disrespectful. On the contrary, if there was any inaccuracy or incompleteness in her answers that may well have been due to the fact that she was over-awed by the presence of the Court—the antithesis of contempt.

8. To punish as a contempt that which is not a contempt even though it be a crime is in violation of the Federal Constitution, Article 3, Sec. 2, Clause 3; Amendment 6.

See *Boyd vs. Glucklich, supra.*

Fifth Point.

Petitioner's conviction for contempt for committing perjury on her voir dire was not proved beyond a reasonable doubt or even sustained by any relevant evidence.

1. The trial court found that petitioner committed perjury in her answers on the subject of bias (R. 106, 107). Mrs. Clark, when examined by the Court as to her qualifications, stated that she *felt* that her mind was then open and free and that she was not biased either one way or the other. She said she *thought* she could follow the evidence, or would try to follow the evidence, and base her judgment on that and the law as given to her by the Court (R. 18).

2. The trial court stated in its decision that this inquiry

was "connected with some difficulty. It is impossible, of course, to ascertain with mathematical certainty the state of her mind when examined as a juror" (R. 106). Nevertheless the Court felt equal to the task and found that the evidence established what Mrs. Clark *felt* and *thought* beyond a reasonable doubt. The finding was directly opposed to the only direct testimony on the question, that of Mrs. Clark herself, and if supported by any evidence at all it was wholly circumstantial in character.

3. The only unfavorable evidence having the remotest bearing upon what petitioner *felt* and *thought* at the time of her examination was testimony as to subsequent statements claimed to have been made by her during the course of the trial of the criminal case and during the deliberations of the jury in that case, and the fact that she voted for an acquittal.

4. The natural effect of a trial is to create sympathy or prejudice in the mind of the juror. Accordingly, testimony that during the course of the trial a juror made statements which might indicate sympathy or bias *at that time* would be most unsatisfactory testimony to prove what the juror *felt* and *thought* at the time of the *voir dire*. *Matter of Cochran*, 237 N. Y. 336, 143 N. E. 212, is squarely in point. There the juror exhibited extreme bias during the deliberations of the jury and refused to vote for a conviction, although he apparently believed the defendant guilty. As to the charge that he falsely stated on his examination as to qualifications as a juror that he had no bias or prejudice, the Court said:

> "We fail to find, however, any evidence whatever from which an inference can be drawn that his answers in this respect were untrue at the time they were made."

5. Accusation of criminal contempt must be supported

by evidence sufficient to convince the minds of the triers beyond a reasonable doubt of the actual guilt of the accused.

Gompers vs. Buck's Stove, etc., Co., 221 U. S. 418.
Michaelson vs. United States, 266 U. S. 42.

6. In the present case the question is whether the facts and circumstances proven were inconsistent with the following theories of innocence:

(1) That petitioner, at the time of her examination, was unbiased, or if she was biased, that it was a case of bias of which she was not *conscious* at the time of her examination. Every trial lawyer knows that cases of unconscious bias on the part of jurors are extremely common; that cases of known bias are exceedingly rare.

(2) That any subsequent statements made by petitioner in so far as they indicated bias were the result of her sympathies having been swayed by the proceedings at the trial.

(3) That petitioner voted for an acquittal because she was not convinced that the evidence showed the defendants to be guilty beyond a reasonable doubt, and that in so voting she was dominated not by some mysterious dominating will, alluded to in the trial court's opinion (R. 107), but by her oath as a juror and her own conscience.

Sixth Point.

A conviction of contempt for committing perjury cannot be sustained where based wholly upon circumstantial evidence.

1. It has long been the established rule in perjury cases that the falsity of the language assigned as perjury, the *corpus delicti* of the crime, must be proved by the sworn and

direct testimony of two living witnesses, or of one witness and by corroborating circumstances.

Wigmore on Evidence, Secs. 2040-2043.

The rule has been explained as being necessary to protect honest witnesses from intimidation in order that voluntary evidence for the purposes of justice will be forthcoming.

Id., Sec. 2041.

2. In *United States vs. Wood*, 14 Peters 430, the rule was approved in the following language (p. 440):

> "It is a right rule, founded upon that principle of natural justice which will not permit one of two persons, both speaking under the sanction of an oath, and presumptively entitled to the same credit, to convict the other of false swearing, particularly when punishment is to follow."

In *United States vs. Wood*, the Court held that the rule was applicable where "oral testimony is exclusively relied upon" but was not applicable where the perjury could be proved "by documentary or written testimony springing from" the accused "with circumstances showing the corrupt intent."

3. The rule has been given recent sanction by this Court in *Hammer vs. United States*, 271 U. S. 620. There the Court said (p. 626):

> "The general rule in prosecutions for perjury is that the uncorroborated oath of one witness is not enough to establish the falsity of the testimony of the accused set forth in the indictment as perjury. The application of that rule in federal and state courts is well nigh universal. The rule has long prevailed, and no enactment in derogation of it has come to our attention. The absence

of such legislation indicates that it is sound and has been found satisfactory in practice."

4. In the case at bar no witness contradicted petitioner's testimony as to what she felt and thought at the time of her examination. There was no documentary evidence bearing on the question. The finding of perjury was, therefore, contrary to the rule, and not within the only exception to the rule acknowledged by the Supreme Court of the United States.

5. The rule is firmly established in the federal courts that a conviction for perjury based upon circumstantial evidence cannot be sustained. In *Clayton vs. United States*, 284 F. 537, the fourth circuit reviewed a conviction for perjury on account of testimony given before the grand jury. The testimony asserted to be false was to the effect that the accused had not been in possession of liquor during a certain period and that he had not been drunk during a certain period. The conviction was based upon the testimony of two witnesses as to what the accused had told them in private conversations prior to the time he had testified as indicated (infinitely stronger proof of perjury than can be found in the present record). The conviction was reversed. The Court said (p. 540):

> "This was quite insufficient, for the falsity of a sworn statement is not shown by proof of an unsworn contradictory statement. In view of the strong presumption of innocence and because of the solemnity of his oath, credit must be given to what defendant said under oath, rather than what he may have said to the contrary when not under oath."

Other cases holding that a conviction of perjury cannot be

had on circumstantial evidence are:

Allen vs. United States, 194 Fed. 664 (C. C. A. 4).
Sullivan vs. United States, 161 Fed. 253 (C. C. A. 1).
Canal Zone vs. Kerr, 2 Canal Zone Sup. Ct. 262.
See also cases collected in 15 *A. L. R.* 634, 637.

6. In a proceeding for criminal contempt based upon perjury it would seem that the defendant, being deprived of the protection which a trial by jury affords, should not be convicted by less reliable evidence than is required in cases of indictment for perjury.

Seventh Point.

The statements and vote of a petit juror during the deliberations of the jury are privileged.

1. We believe it has long been the general understanding of both bench and bar that communications made by a juror in the jury room are absolutely privileged.

2. *Wigmore,* in his *Work on Evidence,* states that a communication is privileged where four requirements are met (Sec. 2285):

> "(1) The communications must originate in a confidence that they will not be disclosed; (2) this element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties; (3) the relation must be one which in the opinion of the community ought to be sedulously fostered; and (4) the injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation."

3. With reference to the privileged character of communications by jurors in the jury room the same learned author says (Sec. 2346):

> "The requirements of the general principle of privileged communications (*ante* §2285) are fully satisfied for communications between jurors during retirement. The communications originate in a confidence of secrecy; this confidence is essential to the due attainment of a jury's constitutional purpose; the relation of juror is clearly entitled to the highest consideration and most careful protection; and the injury from disclosure would certainly overbalance the benefits thereby gained. It has therefore always been assumed and conceded that a juror is privileged not to have his communications with a fellow juror disclosed upon the witness stand against his consent."

4. *Jones*, in his *Commentaries on Evidence*, 2nd Ed., Sec. 2212, says:

> "It is essential to the due administration of justice that jurors should understand that their deliberations in the jury room are inviolable, and that the reasons for their verdict cannot be questioned."

5. *Hughes*, in his *Work on Evidence*, says (p. 301):

"The deliberations of petit jurors, while engaged in seeking to reach a verdict, are also privileged." (Page 302:) "On the ground of public policy, freedom of expression in the jury room is absolutely essential. It follows, therefore, that the rule of privilege is applicable in the full sense of the term to the deliberations of petit jurors. This principle has always obtained."

6. A multitude of decisions hold that a verdict may not be

upset by testimony of a juror as to his own or his fellow's misconduct in the jury room. See cases collected in note 2 to *Wigmore on Evidence,* Sec. 2349. These decisions are not always grounded upon the same principle. Of course, where a juror offers to show his own misconduct during the deliberations of the jury the question of privilege would not be raised. But where it is proposed to show by one juror what was said by another, in order to impeach the verdict, the privilege is applicable, and it will be found on examination that many of the decisions holding that a verdict may not be impeached by testimony of the jurors are rested on this ground.

See *Wigmore on Evidence,* Secs. 2348-2354.

7. In *Woodward vs. Leavitt,* 107 Mass. 453, a leading case, it was held that what was said and done by a juror in a jury room would not be received to rebut the charge, on a motion for new trial, that the juror was biased at the time he was sworn. The Court said (p. 460):

> "It is essential to freedom and independence of their deliberations that their discussions in the jury room should be kept secret and inviolable; and to admit the testimony of jurors to what took place there would create distrust, embarrassment and uncertainty." (Page 463:) "The secrecy of the deliberations and discussions of the jury, and the exemption of jurors from the liability of being questioned as to their motives and grounds of action, are highly important to the freedom and independence of their decisions."

Woodward vs. Leavitt is illustrative of the cases which hold that deliberations in the jury room may not be disclosed even where no attempt is made to impeach the verdict.

See also *Hewitt vs. Chapman,* 49 Mich. 4.

8. On this phase of the case the lower courts have relied upon a *dictum* in *McDonald vs. Pless*, 238 U. S. 264, 269 (R. 107). In that case it was held that testimony of jurors would not be received to show *misconduct* in the jury room (a quotient verdict). The principle the Court there laid down was that the testimony of jurors would not be received to show their own or their fellows' misconduct in the jury room in order to impeach the verdict. The *dictum* that this principle

> "is limited to those instances in which a private party seeks to use a juror as a witness to impeach a verdict"

has no application to the case at bar. This observation had reference to whether *misconduct in the jury room* might be shown in cases where no attempt was made to impeach the verdict. The question of privilege was not before the Court or considered by it. Here we are concerned with whether what was said by a juror in the jury room may be used against him to prove an alleged wrongful act at some other time and place.

9. The case of *In re Nunns*, 188 App. Div. 424, 176 N. Y. Supp. 858, holds that statements made by jurors in a jury room may be shown to prove prior misconduct, but not

> "deliberations of the jury upon the case as presented to them by the evidence."

Even the doctrine of this decision does not go to the length of justifying what was done in the case at bar. Two judges dissented in the Nunns case and to us the dissenting opinion is the more convincing.

10. The decision in *In re Nunns* is repudiated in *Matter of Cochran*, 237 N. Y. 336, 143 N. E. 212. There a juror had been held in contempt of court on two grounds: First, for

alleged untrue statements made by him on his examination as to his qualifications as a juror, in that he stated that he had no bias or prejudice that would affect his decision and that he knew of no reason why he could not fairly try the case; second, improper conduct in the jury room in that he stated facts to be in evidence as to which no testimony had been given and refused to vote for a conviction although he believed the defendant guilty, etc. The conviction was reversed. The Court said that a juror might not be punished on account of the verdict, and held:

> "It is not alone as to the final result—the verdict—that they are protected. Public policy requires that they be given the utmost freedom of debate as it requires it in the case of the legislature."

11. The pernicious effect of denying the privilege of secrecy to a juror is shown by what has happened in the present case. A disagreement by a jury usually results in hostility between the opposing camps and frequently in anger on the part of the judge whose calendar is thereby clogged. Where the disagreement is produced by a single dissenting vote this hostility and anger is apt to be all the more pronounced, and this is particularly so where the minority juror is a woman who has dared to oppose her opinion to that of eleven infallible men. In addition, in the case at bar, between the disagreement of the jury and the trial of the contempt charges, there was an unparalleled barrage of newspaper comment unfavorable to Mrs. Clark. The trial court took notice of this for it said in its decision:

> "Mrs. Clark has brought upon herself the contempt of the community in which she lives—not because she voted for the acquittal of the defendants—but because her vote was not believed to represent her honest con-

victions based on the evidence and the law" (R., 104, 107).

12. Under such circumstances we submit that the testimony of the other jurors is not likely to present a fair account of what happened in the jury room. The minority juror will be lucky if he only has to meet exaggerated testimony, and not downright perjury. The present record offers a very one-sided account of what happened in the jury room, as petitioner offered no testimony on that subject. If what is said in the jury room can be used to convict a juror of contempt of court for stating that he was unbiased on his *voir dire*, then no dissenting juror is safe.

Eighth Point.

The erroneous reception of evidence which is relied upon by a trial court in arriving at its judgment is reversible error.

1. If the trial court had not considered and relied upon the evidence erroneously admitted, then the error in receiving such evidence might not call for a reversal. But the fact is that the trial court in convicting Mrs. Clark relied to a very large extent upon what she is claimed to have said and done in the jury room and upon the fact that she voted for an acquittal. It is said in the opinion—

> "during the deliberations of the jury, after the case was finally submitted, she announced that since Mr. Horowitz had been unable to convince her of the guilt of the defendants, the other jurors could hardly expect to do so. She virtually closed her ears to the arguments of other jurors, and made a statement with respect to the Government's witness Cobel, the effect of which was to

charge him with having given perjured testimony in a case in the south in an attempt to convict an innocent man. * * * Mrs. Clark, during the deliberations of the jury, expressed a wish that she might consult with her husband and secure his advice. She also made statements to the effect that she could not vote to send seven men to the penitentiary. The jury were out for approximately one week and stood eleven for conviction, and one (Mrs. Clark) for acquittal."

Reference is also made in the opinion to petitioner's unyielding attitude in the jury room (R. 101, 102, 107).

2. The fallacy in the decision of the Circuit Court of Appeals on this phase of the case is almost conclusively demonstrated by Judge Gardner in his dissenting opinion (R. 163).

CONCLUSION.

In *Bushell's Case*, Vaughan 135, in the year 1670, it was established that a juror may not be punished on account of his vote or verdict, and this principle has ever since been considered essential to the maintenance of the constitutional right of trial by jury. Yet the decisions of the courts below raise a grave question whether this juror is not being punished, by indirection, because she refused to convict. This suggestion is made because it seems fantastic to contend that proof was made beyond a reasonable doubt that petitioner committed perjury in stating what she *felt* and *thought* on her *voir dire*.

Moreover a grave question is presented whether the decisions of the lower courts do not disclose, in an undue extension of the contempt power, a judicial encroachment upon the lawful domain of the jury.

Certainly if the decisions of the courts below are sound law, jury service by independent thinking men and women is much more hazardous than it has heretofore been supposed to be. In the language of this Court in *Sinclair vs. United States*, 279 U. S. 749, 765:

> "If those fit for juries understand that they may be freely subjected to treatment like that here disclosed, they will either shun the burdens of the service or perform it with disquiet and disgust."

Respectfully submitted,

SIGURD UELAND,
Attorney for Petitioner.

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Supreme Court of the United States

OCTOBER TERM, 1932.

No. 531.

GENEVIEVE A. CLARK,

Petitioner,

vs.

UNITED STATES OF AMERICA.

ON CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

PETITIONER'S SUPPLEMENTAL BRIEF TO BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

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INDEX.

	Page
Opinions below	1
Statement	1
Specifications of assigned errors intended to be urged	2
Summary of argument	2
Argument:	
First point—It was a denial of due process of law for the District Court to proceed to trial on the return day named in the rule to show cause	3
Second point—It was a denial of due process of law to convict petitioner of contempt for withholding information when she was charged in the information with an entirely distinct and different contempt	7
Third point—A juror's failure to volunteer information on his voir dire is not a contempt	8
Fourth point—Perjury by a juror on his voir dire is not a contempt unless contumacy is shown	8
Fifth point—Petitioner's conviction for contempt for committing perjury on her voir dire was not proved beyond a reasonable doubt or even sustained by any relevant evidence	8
Sixth point—A conviction of contempt for committing perjury cannot be sustained where based wholly upon circumstantial evidence	8
Seventh point—The statements and vote of a petit juror during the deliberations of the jury are privileged	10
Eighth point—The erroneous reception of evidence which is relied upon by a trial court in arriving at its judgment is reversible error	11
Ninth point—Petitioner's sworn answer and positive testimony that she did not intend to mislead the Court, and that she answered truthfully with respect to her freedom from bias were conclusive	15

TABLE OF CASES CITED.

Page

Boyd vs. Glucklich, 116 Fed. 131, 140 ..... 14, 16
Conley vs. United States, 59 Fed. (2d) 929, 935 16
Cooke vs. United States, 267 U. S. 517, 537 ..... 4, 6, 9
Craig vs. Hecht, 263 U. S. 255, 279 12
In re Chadwick, 109 Mich. 588, 67 N. W. 1071 16
Fishback vs. State, 131 Ind. 304, 30 N. E. 1088 16
Gompers vs. Buck's Stove & Range Co., 221 U. S. 418, 440 ..... 8, 9
Gompers vs. United States, 233 U. S. 604 9
Gridley vs. United States, 44 F. (2d) 716, 742 (C. C. A. 6th) 12
Ex parte Grossman, 267 U. S. 87 9
Hammer vs. United States, 271 U. S. 620 10
Hughes vs. People, 5 Colo. 436 16
Michaelson vs. United States, 266 U. S. 42, 66 9
Ex parte Nelson, 251 Mo. 63, 157 S. W. 794 16
Percival vs. State, 45 Neb. 741, 64 N. W. 221 16
Powell vs. State of Alabama, 53 S. Ct. 55 6
Sinclair vs. United States, 279 U. S. 749 ..... 11, 12
State vs. New Mexican Printing Co., 25 N. M. 102, 177 Pac. 751 .. 16
Toledo Newspaper Co. vs. United States, 247 U. S. 402, 421 8
United States vs. Goldman, 277 U. S. 229 9
United States vs. Shipp, 203 U. S. 563 ..... 15, 16
The United States vs. King, 7 How. 833, 854, 855 11
In re Watts & Sachs, 190 U. S. 1 12

STATUTES CITED.

U. S. Code, Title 18, Sec. 582 9
U. S. Code, Title 28, Sec. 385 5
U. S. Code, Title 28, Sec. 387 6

TEXT BOOKS CITED.

Blackstone, 4 Commentaries 286, 287 ..... 3, 15
16 C. J. 449 6

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PETITIONER'S SUPPLEMENTAL BRIEF TO BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

OPINIONS BELOW.

The opinion of the District Court (R. 99-108) is reported in 1 F. Supp. 747. The opinion of the Circuit Court of Appeals is reported in 61 F. (2d) 695.

STATEMENT.

For brevity reference is made to the statement in petitioner's brief in support of the petition for certiorari.

SPECIFICATIONS OF ASSIGNED ERRORS INTENDED TO BE URGED.

Petitioner intends to urge assigned errors numbered 1 to 24, inclusive (R. 109-113).

SUMMARY OF ARGUMENT.

1. It was a denial of due process of law for the District Court to proceed to trial on the return day named in the rule to show cause.

2. It was a denial of due process of law to convict petitioner of contempt for withholding information when she was charged in the information with an entirely distinct and different contempt.

3. A juror's failure to volunteer information on his *voir dire* is not a contempt.

4. Perjury by a juror on his *voir dire* is not a contempt unless contumacy is shown.

5. Petitioner's conviction for contempt for committing perjury on her *voir dire* was not proved beyond a reasonable doubt, or even sustained by any relevant evidence.

6. A conviction of contempt for committing perjury cannot be sustained where based wholly upon circumstantial evidence.

7. The statements and vote of a petit juror during the deliberations of the jury are privileged.

8. The erroneous reception of evidence which is relied upon by a trial court in arriving at its judgment is reversible error.

9. Petitioner's sworn answer and positive testimony that she did not intend to mislead the court, and that she answered truthfully with respect to her freedom from bias were conclusive.

ARGUMENT.

First Point.

It was a denial of due process of law for the District Court to proceed to trial on the return day named in the rule to show cause.

In addition to the argument already presented on this point in petitioner's brief in support of the petition for certiorari, petitioner suggests the following:

1. The rule to show cause was served on petitioner only five days before the return day (R. 6, 10). Under Rule 6 of the District Court of Minnesota eight days' notice is the usual minimum. Rule 6 (2) reads as follows:

> "All notices of motion and orders to show cause requiring service, shall be served eight days before the time appointed for the hearing, unless the Court, by order, prescribes a shorter time, or unless otherwise provided in these rules."

As no reason appeared for haste, the fact that a shorter period was allowed calls for comment, as it tends to characterize the entire proceeding as well as to support petitioner's contention that she was not allowed a reasonable opportunity to make her defense.

2. The procedure in cases of criminal contempt (other than those committed in the face of the court so as to call for summary punishment) is stated by *Blackstone*, 4 *Commentaries* 286, as follows:

"If the contempt be committed in the face of the Court, the offender may be instantly apprehended and imprisoned, at the discretion of the judges, without any farther proof or examination. But in matters that arise at a distance and of which the Court cannot have so perfect a knowledge, unless by the confession of the party or the testimony of others, if the judges upon affidavit see sufficient ground to suspect that a contempt has been committed they either make a rule on the suspected party to show cause why an attachment should not issue against him; or, in very flagrant instances of contempt, the attachment issues in the first instance; as it also does, if no sufficient cause be shown to discharge; and thereupon the Court confirms, and makes absolute, the original rule. This process of attachment is merely intended to bring the party into court; and, when there, he must either stand committed, or put in bail, in order to answer upon oath to such interrogatories as shall be administered to him, for the better information of the Court with respect to the circumstances of the contempt. These interrogatories are in the nature of a charge or accusation, and must by the course of the Court be exhibited within the first four days; and, if any of the interrogatories is improper, the defendant may refuse to answer it, and move the Court to have it struck out. If the party can clear himself upon oath, he is discharged; but, if perjured, may be prosecuted for the perjury."

This practice of issuing a rule to show cause was approved by Chief Justice Taft in *Cooke vs. United States*, 267 U. S. 517, 537, in the following language:

"In such a case, and after so long a delay, it would

seem to have been proper practice, as laid down by *Blackstone*, 4 *Commentaries* 286, to issue a rule to show cause. The rule should have contained enough to inform the defendant of the nature of the contempt charged."

While the practice of trying a charge of criminal contempt on interrogatories is not now generally followed, the purpose of the rule to show cause is still as in Blackstone's time, to bring the defendant into court to answer or plead. In our system of law the answer follows the complaint, the arraignment and plea follow the indictment or information. In other words, the issues are first framed. In the present case the information or petition and the rule to show cause only indicated that this customary procedure would be followed (R. 5, 6). The question now submitted to this Court is whether it was reasonable or fair, in view of the uncontradicted assertion by petitioner's counsel that he was not ready (R. 10-12) to proceed to trial *immediately* after petitioner filed her answer and plea of not guilty.

3. While the procedure in criminal contempts under U. S. Code, Title 28, Sec. 385, is not governed by statute, the Clayton Act, in dealing with a limited class of contempts, has given statutory recognition to the customary and proper mode of procedure. Under this statute an "affidavit of some credible person," or an information by a district attorney "that there is reasonable ground to believe" that some person has been guilty of contempt is first filed. Thereupon the court issues a rule to show cause—

> "upon a day certain why he should not be punished therefor, which rule, together with a copy of an affidavit or information, shall be served upon the person charged, with sufficient promptness to enable him to

prepare for and make return to the order at the time fixed therein. If upon or by such return, in the judgment of the Court, the alleged contempt be not sufficiently purged, *the trial shall be at a time and place fixed by the Court.*" (Italics ours.)

U. S. Code, Title 28, Sec. 387.

4. In criminal cases triable by jury it is well settled that it is a violation of a fundamental right to proceed to trial over a prisoner's objection immediately after the plea of guilty.

16 *C. J.* 449:

"Every person accused of crime and his counsel are entitled to a reasonable time in which to prepare for trial after an accusation of crime is made; and a failure to afford this right is neither consonant with a sense of justice nor a fair and impartial administration of the law." (Citing many cases.)

In cases of criminal contempt there is more cogent reason for not proceeding to trial immediately following the answer. The defendant in a contempt proceeding who is ordered to show cause may not unreasonably expect that sufficient cause may be shown to discharge, or that his answer will purge himself of the contempt, and that there will be no trial.

5. The right of a defendant charged with criminal contempt to be represented by counsel having been established by this Court in *Cooke vs. United States*, 267 U. S. 517, the right to reasonable time to prepare for trial follows as a necessary incident to that right. This has been shown (and conceded in the dissenting opinion) in the recent decision of *Powell vs. State of Alabama*, 53 S. Ct. 55. In that case

this Court referred to the period from the time of the arraignment of the defendants until the beginning of their trial, a period of six days, as—

> "perhaps the most critical period of the proceedings against these defendants * * * when consultation, thorough-going investigation and preparation were vitally important * * *."

The Court also said, which seems applicable to the case at bar:

> "The prompt disposition of criminal cases is to be commended and encouraged. But in reaching that result a defendant, charged with a serious crime, must not be stripped of his right to have sufficient time to advise with counsel and prepare his defense. To do that is not to proceed promptly in the calm spirit of regulated justice but to go forward with the haste of the mob."

Second Point.

It was a denial of due process of law to convict petitioner of contempt for withholding information when she was charged in the information with an entirely distinct and different contempt.

It is urged in the Brief for the United States in opposition to the petition for certiorari that petitioner's conviction must stand even though she was convicted of a contempt not charged in the information for the reason that she was also convicted for something which was charged in the information, *i. e.*, for committing perjury in her answers as to her own bias (see p. 21). This would amount to sending the cause back to the District Court with instructions to punish petitioner on two counts, whereas she could only be

guilty of one. Such a notion has not only been repudiated in *Gompers vs. Buck's Stove & Range Co.*, 221 U. S. 418, 440, cited on petitioner's original brief, but also in *Toledo Newspaper Co. vs. United States*, 247 U. S. 402, 421.

THIRD POINT.

A juror's failure to volunteer information on his voir dire is not a contempt.

On this point we have nothing to add to what was stated in petitioner's original brief.

FOURTH POINT.

Perjury by a juror on his voir dire is not a contempt unless contumacy is shown.

On this point we have nothing to add to what was stated in petitioner's original brief.

FIFTH POINT.

Petitioner's conviction for contempt for committing perjury on her voir dire was not proved beyond a reasonable doubt or even sustained by any relevant evidence.

On this point see petitioner's original brief and what is stated under the Eighth Point, *infra*.

SIXTH POINT.

A conviction of contempt for committing perjury cannot be sustained where based wholly upon circumstantial evidence.

In the Brief for the United States in opposition to the

petition for certiorari, it is urged that the rule as to proof of perjury is not applicable in a criminal contempt proceeding even though the offense charged in such proceeding is the commission of perjury.

While criminal contempts are said to be *sui juris*, this Court has held that in cases of criminal contempt the defendant is entitled to notice of the charge, reasonable opportunity to defend, the assistance of counsel, and the right to call witnesses. *Cooke vs. United States*, 267 U. S. 517. It is likewise held that a criminal contempt is an "offense against the United States" within the meaning of Article II, Sec. 2, Clause 1 of the Constitution and pardonable by the President thereunder. *Ex parte Grossman*, 267 U. S. 87. It is likewise held that such a proceeding "is a criminal case" within the meaning of the Criminal Appeals Act, U. S. Code, Title 18, Sec. 682. *United States vs. Goldman*, 277 U. S. 229. It is likewise established that in criminal contempt the defendant can only be convicted by proof beyond a reasonable doubt and cannot be compelled to testify against himself.

Gompers vs. Buck's Stove & Range Co., 221 U. S. 418, 444.

Michaelson vs. United States, 266 U. S. 42, 66.

It is likewise determined that a proceeding for criminal contempt is barred by the Statute of Limitations with respect to offenses not capital.

U. S. Code, Title 18, Sec. 582.

Gompers vs. United States, 233 U. S. 604.

In the case last cited Mr. Justice Holmes said, at page 610:

> "It is urged in the first place that contempts cannot be crimes, because, although punishable by imprisonment and therefore, if crimes, infamous, they are not within the protection of the Constitution and the

> amendments giving a right to trial by jury, etc., to persons charged with such crimes * * *. It does not follow that contempts of the class under consideration are not crimes, or rather, in the language of the statute, offenses, because trial by jury as it has been gradually worked out and fought out has been thought not to extend to them as a matter of constitutional right. These contempts are infractions of the law, visited with punishment as such. If such acts are not criminal we are in error as to the most fundamental characteristic of crimes as that word has been understood in English speech."

In view of these decisions, and in view of the fact that a defendant in a criminal contempt proceeding is placed in jeopardy of imprisonment for a period of time to which the law sets no precise limitation, it seems there is no merit in the Government's position. Where the law requires a fact to be proved by a certain kind or quantum of evidence, it would be a gross injustice if the same kind or amount of proof were not required in criminal contempt proceedings, where the additional safeguard of a jury trial is wanting. The rule as to perjury was applied by this Court in *Hammer vs. United States*, 271 U. S. 620, which was an indictment for subornation of perjury. We are unable to see why it should not also be applied in any criminal proceeding where perjury must be shown to sustain the charge.

Seventh Point.

The statements and vote of a petit juror during the deliberations of the jury are privileged.

Under this point we have nothing to add to what is said in petitioner's original brief.

Eighth Point.

The erroneous reception of evidence which is relied upon by a trial court in arriving at its judgment is reversible error.

1. It is contended that even though testimony relating to petitioner's actions and utterances in the jury room should not have been admitted, it does not follow that her conviction should be reversed, there being sufficient other evidence to support the conviction. Reliance is placed on what was said by this Court in *Sinclair vs. United States*, 279 U. S. 749, 767. See page 32 of Brief for the United States in opposition to the petition for certiorari.

In the Sinclair case this Court quoted with approval from *The United States vs. King*, 7 How. 833, 854, 855, where it was held that a reversal was not called for because evidence objected to and received was not admissible "in some unimportant particulars." *The United States vs. King* was a civil action in Louisiana in the nature of an action in ejectment tried before a court without a jury. The rule there laid down and approved in the Sinclair case is conceded to be correct. Where a trial is before a judge without a jury minor errors in omitting evidence may not call for a reversal if it can be fairly presumed that the trial judge disregarded the incompetent evidence. Where, however, it appears from the court's decision that the improper evidence greatly influenced the court in arriving at its judgment, an entirely different question is presented. In an equity cause where the appellate court tries the matter *de novo*, it may be that there might still be an affirmance. But in a criminal proceeding the appellate court does not, of course, attempt to do this. In the case at bar the Circuit Court of Appeals in its decision stated that if the evidence as to the deliberations

in the jury room were deleted "the record * * * is sufficient to sustain the conviction" (R. 144). But the Circuit Court of Appeals could only *guess* as to what would have been the judgment of the District Court if such deletion were made. To sustain a conviction based, to a very great extent, on evidence improperly received, because of other evidence in the record which might have influenced the Court below, is to sustain a conviction which in fact was never made.

It is noteworthy that in *Sinclair vs. United States*, 279 U. S. 749, this Court did reverse the conviction as to one defendant, William J. Burns. The Court said (p. 761) that the evidence—

> "might reasonably cause one to suspect William J. Burns was a party to the surveillance. But he emphatically denied this and we can find no material evidence to support the charge against him. As to him, the judgment below must be reversed."

Likewise in the case of *In re Watts & Sachs*, 190 U. S. 1, the Court reversed a conviction for contempt because incompetent evidence had been received and the Court was of the opinion (p. 35)—

> "that there was no legal evidence to sustain these convictions for contempt."

See also *Gridley vs. United States*, 44 F. (2d) 716, 742 (C. C. A. 6th).

In *Craig vs. Hecht*, 263 U. S. 255, 279, it was said:

> "But the law gives the person convicted of contempt * * * the right to have the whole question on facts and law reviewed by three judges of the Circuit Court of Appeals who have had no part in the proceeding, and

> if not successful in that Court, to apply to this Court for an opportunity for a similar review here."

A conviction based upon testimony improperly received is not in reality reviewed on either the facts or the law unless either the appellate court proceeds to try the case *de novo* and itself renders judgment on the evidence properly in the record or the judgment below is reversed.

2. If the evidence improperly received be deleted from the record, even assuming that the rule as to proof of perjury is inapplicable (see petitioner's Sixth Point, *supra*), there would remain no evidence tending to sustain the conviction. As shown under petitioner's Seventh Point the deliberations of the jury and petitioner's vote could not be considered. Likewise, as shown under Fifth Point in petitioner's original brief, what petitioner said and did during the course of the trial was too remote to prove conscious bias or an intent to deceive the Court at the time of the *voir dire*.

Testimony intended to prove that petitioner might have been improperly influenced after the trial began could have no relevancy as to whether or not she committed perjury or intended to deceive the Court on her *voir dire*. Evidence that she was influenced after she was sworn as a juror would rather weaken the claim that she knew she was biased or intended to deceive the Court when she was examined as to her qualifications. Yet the Court received all this testimony and was influenced by it (R. 34-44, 93-95, 101, 102; see also R. 106, 107).

Hence petitioner's conviction must be rested on the fact of her ten days' employment by the Foshay Company, more than two years prior to her examination, and upon her conversation with three other women, one of whom was seriously discredited, concerning whether she wished to serve as a

juror and whether she would be accepted on account of her previous employment at the Foshay Company (see petitioner's original brief, p. 9; R. 13-16, 19-21, 66, 90-92).

On the testimony of the Government's witnesses it clearly appears that petitioner expected her employment at the Foshay Company to become known to the Court. Doubtless she expected that the Judge or counsel would ask *by whom* she had been employed. It is hardly possible that if she intended to conceal this prior employment from the Court she would have freely discussed it, as testified to by the Government's witnesses, with strangers shortly prior to her examination.

It is conceded that there was no evidence of corruption on the part of petitioner. It appears to be conceded that there is no evidence affording her a motive to answer falsely or deceptively (see Brief for the United States in opposition to petition for writ of certiorari, p. 16). It is established that there is not "one scintilla of evidence" that the defendants in the Foshay case or their counsel attempted to influence petitioner (R. 107). It is established that petitioner did not know any of the defendants in the criminal case (R. 104, 105). It seems to us that her conviction was founded upon an ungenerous suspicion and must be reversed. As stated by the Court below in *Boyd vs. Glucklich*, 116 Fed. 131, 140:

> "The sea of suspicion has no shore, and the court that embarks upon it is without rudder or compass. No man can be imprisoned for a constructive contempt on suspicion or conjectures or upon inferences which may or may not be well founded. For this reason from the earliest times the doctrine has obtained that when one accused of a constructive contempt in a court of law denies positively and specifically the alleged contempt,

under oath, the proceeding against him for contempt must be dismissed."

NINTH POINT.

Petitioner's sworn answer and positive testimony that she did not intend to mislead the Court, and that she answered truthfully with respect to her freedom from bias were conclusive.

1. On the return day petitioner filed a sworn answer in which she stated positively that she did not have in mind her employment at the Foshay Company at the time of her examination by Judge Molyneaux, and in which she stated positively that her answers on the subject of bias were true (R. 8, 9). On the trial she likewise testified to the same effect (R. 67, 68).

2. It was formerly the law that a person charged with a contempt of which the Court did not have judicial knowledge, could purge himself of the contempt in all cases by denying the commission of the contempt under oath.

> "If the party can clear himself upon oath, he is discharged; but, if perjured, may be prosecuted for the perjury."
>
> 4 *Blackstone, Commentaries*, 287.

3. This rule has been since modified in cases where the contempt consists of overt acts which of themselves prove a contempt.

United States vs. Shipp, 203 U. S. 563.

But where the act charged as a contempt is ambiguous, that is, where the commission of a contempt depends upon the intent with which an ambiguous act was done, the right to purge the contempt under oath still exists. In *United*

States vs. Shipp, supra, the Supreme Court said (p. 574):

> "It may be that even now, if the sole question were the intent of an ambiguous act, the proposition would apply. But in this case it is a question of personal presence and overt acts."

4. In *Boyd vs. Glucklich*, 116 Fed. 131, the Court below said (p. 141):

> "The doctrine thus laid down is still the rule followed by courts of common law; those courts uniformly holding that, if one accused of a constructive contempt fully answers all the charges on his oath, he must be discharged; the answer must, for the purpose of the contempt proceedings, be taken as true, and extrinsic evidence cannot be received to impeach it. And this is the doctrine in the federal courts." (Citing *U. S. vs. Dodge*, 2 Gall. 313, Fed. Cas. No. 14,975, and *In re Pitman*, 1 Curt. 186, Fed. Cas. No. 11,184.)

Since the decision in *United States vs. Shipp*, the same Court has intimated that the doctrine is applicable in cases "where the contempt inheres in the intent with which an ambiguous act was done." *Conley vs. United States*, 59 Fed. (2d) 929, 935.

See also *Hughes vs. People*, 5 Colo. 436.
Fishback vs. State, 131 Ind. 304, 30 N. E. 1088.
In re Chadwick, 109 Mich. 588, 67 N. W. 1071.
Ex parte Nelson, 251 Mo. 63, 157 S. W. 794.
Percival vs. State, 45 Neb. 741, 64 N. W. 221.
State vs. New Mexican Printing Co., 25 N. M. 102, 177 Pac. 751.

The acts on account of which petitioner has been convicted were not in and of themselves contemptuous and only an

unlawful intent on the part of petitioner could under any view render them such. Accordingly the remainder of the old rule applies.

Respectfully,

SIGURD UELAND,

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